

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RAYMOND WIERZBIC, BERNICE WIERZBIC,
BRIAN WIERZBIC, AND ANGELENE WIERZBIC,

Plaintiffs,

v.

Case Number: 1:13-CV-00978-WMS-LGF

COUNTY OF ERIE,
ERIE COUNTY SHERIFFS DEPARTMENT,
ERIE COUNTY SHERIFF, TIMOTHY HOWARD,
Individually and in his official capacity,
DEPUTY ERIE COUNTY SHERIFF MICHAEL HOOCK,
Individually and in his official capacity,
DEPUTY ERIE COUNTY SHERIFF JASON WEISS,
Individually and in his official capacity,
DEPUTY ERIE COUNTY SHERIFF THOMAS WAS,
Individually and in his official capacity,
DEPUTY ERIE COUNTY SHERIFF JAMES FLOWERS
Individually and in his official capacity,
TOWN OF AURORA,
EAST AURORA POLICE DEPARTMENT,
EAST AURORA POLICE CHIEF RONALD KROWKA,
Individually and in his official capacity,
EAST AURORA POLICE OFFICER ROBERT BRAEUNER,
Individually and in his official capacity,

Defendants.

COUNTY DEFENDANTS
RULE 56.1 STATEMENT OF MATERIAL FACTS

The Defendants, COUNTY OF ERIE (hereinafter “Erie County”), ERIE COUNTY SHERIFF’S DEPARTMENT (hereinafter “Sheriff’s Department”), ERIE COUNTY SHERIFF, TIMOTHY HOWARD (hereinafter “Sheriff Howard”), individually and in his official capacity, DEPUTY ERIE COUNTY SHERIFF MICHAEL HOOCK, individually and in his official capacity, DEPUTY ERIE COUNTY SHERIFF JASON WEISS, individually and in his official

capacity, DEPUTY ERIE COUNTY SHERIFF THOMAS WAS, individually and in his official capacity, and DEPUTY ERIE COUNTY SHERIFF JAMES FLOWERS, individually and in his official capacity, (collectively the “County Defendants”), in accordance with Local Rule 56.1 state that the following are material facts as to which there are no genuine issues to be tried:

1. Plaintiffs commenced this action by the filing of a complaint on September 27, 2013 asserting the following causes of action against all Defendants: Federal claims pursuant to 42 U.S.C. 1983 for (1) excessive force; (2) malicious prosecution; (3) refusing to prevent [presumably use of force]; (4) conspiracy; (5) violation of 1st Amendment rights and (6) violation of 5th Amendment rights. The complaint also alleges State claims for: (1) false arrest; (2) false imprisonment; (3) assault; (4) battery; (5) intentional infliction of emotional distress; (6) negligent hiring and retention and (7) negligent training and supervision. (Complaint, Ex. A., Dkt. 1 ¶ 16)

2. The County Defendants interposed an Answer on or about October 11, 2013. (Answer, Ex. B, Dkt. 8)

3. This action arises out of an incident which occurred on July 2, 2012 at 49 Willis Road in the Town of Aurora. (Complaint, Ex. A ¶ 17). On that date, Erie County Sheriff’s Deputy Michael Hooch arrived at the premises to serve a Subpoena with Restraining Notice upon Raymond Wierzbic. (A copy of the Subpoena is attached as Exhibit C.)

4. Deputy Hooch was unable to ascertain which of the Plaintiffs was Raymond Wierzbic. Plaintiffs were hostile and aggressive and they refused to follow directions given by Deputy Hooch. Deputy Hooch felt threatened and he called for backup. Defendants Deputies Weiss, Was and Flowers arrived on the scene as did East Aurora Police Officer Robert Braeuner.

An altercation ensued and the Plaintiffs were arrested. (Arrest and Booking Forms attached as Exhibit D.)

5. At no time was Sheriff Timothy Howard at the premises, at no time was Sheriff Howard personally involved or aware of this incident. (Howard Affirmation attached as Exhibit E.)

6. Plaintiff Raymond Wierzbic was charged with violations of New York Penal Law sections 205.30 (resisting arrest); 195.05 (obstructing governmental administration), 120.15 (menacing in the 3rd degree) and 240.26 (harassment in the 2nd degree). Brian Wierzbic was charged with violation of New York Penal Law sections 120.00(1)(assault in the 3rd degree); 195.05 (obstructing governmental administration) and 205.30 (resisting arrest). Bernice Wierzbic was charged with violation of New York Penal Law sections 205.30 (resisting arrest) and 195.05 (obstructing governmental administration).

7. After a non-jury trial in the Town of Aurora in front of Hon. Jeffrey Markello Raymond Wierzbic was convicted of resisting arrest, menacing in the 3rd degree and harassment in the 2nd degree. Brian Wierzbic was convicted of obstructing governmental administration. Bernice Wierzbic was acquitted of both charges. (Disposition Sheets attached as Exhibit F.) Raymond and Brian Wierzbic were sentenced to a conditional discharge, fined \$750.00 and ordered to perform 20 hours of community service.

8. On appeal, Erie County Court Judge Michael Pietruszka reversed the convictions of Brian and Raymond Wierzbic. Pietruszka Decision attached as Exhibit G.

9. After commencement, this matter was referred to Magistrate Foschio (Dkt.10). Thereafter various scheduling Orders were entered. As is relevant to the instant proceeding, the

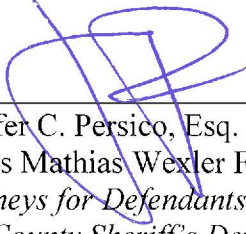
Third Amended Scheduling Order set the discovery deadline for January 29, 2016. A copy of the Order is attached as Exhibit H, Dkt. 67.

10. Depositions of the Plaintiffs were taken on January 8, 2016. The Plaintiffs elected not to depose any of the named Defendants or any representatives of the County or the Sheriff's Department.

11. A Fifth Amended Scheduling order issued which set the deadline for dispositive motions as May 25, 2016. A copy of the Order is attached as Exhibit I, Dkt. 75.

12. As is more fully set forth in the accompanying affidavits and memorandum of law, all of the claims against the County of Erie; the Sheriff's Department or Sheriff Howard should be dismissed. The alleged violations of the First and Fifth Amendments and the intentional tort state claims against all County defendants must be dismissed. Lastly, to the extent the punitive damages are claimed, that claim must also be dismissed.

Dated: May 25, 2016
Buffalo, New York



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